



Public Works Utility Operations

DATE: April 9, 2024

FROM: Michelle Klose, Director Public Works Utilities

ITEM: Engineering contracts for utility operations and maintenance activities

REQUEST:

Approval of contracts with seven engineering consulting firms for operations and maintenance activities for Utility Operations.

BACKGROUND INFORMATION:

An RFQ was released in December 2023 and a review committee scored eleven proposals from engineering firms and selected the firms of Apex Engineering Group, Inc., AE2S, HDR Engineering, Inc., Houston Engineering, Inc., Moore Engineering, Inc., Stantec, and Bartlett & West to provide engineering consulting services for operations and maintenance activities for Utility Operations. The contracts cover engineering services through December 31, 2027, and includes providing analysis, design, construction, and technical support services for operation and maintenance activities for the water and wastewater treatment plants, water distribution, wastewater collection and storm water collection systems. All contracts will follow the same format and allow the Director of Utility Operations to execute task orders for work within the operation and maintenance budget that do not exceed \$20,000 per task and provides any task orders exceeding \$20,000 to be presented to the City Commission for approval.

RECOMMENDED CITY COMMISSION ACTION:

Approve contracts through December 31, 2027, with Apex Engineering Group, Inc., AE2S, HDR Engineering, Inc., Houston Engineering, Inc., Moore Engineering, Inc., Stantec, and Bartlett & West for operation and maintenance activities and delegate signing authority to execute task orders for work within the operation and maintenance budget that do not exceed \$20,000 per task to the Director of Utility Operations.

STAFF CONTACT INFORMATION:

Amber Araujo, Executive Assistant, 701-355-1739, aaraujo@bismarcknd.gov

ATTACHMENTS:

1. Draft Engineering Contracts for Utility O&M

**SHORT FORM OF TASK ORDER AGREEMENT
BETWEEN OWNER AND ENGINEER
FOR
PROFESSIONAL SERVICES**

THIS IS AN AGREEMENT effective as of _____ (“Effective Date”) between City of Bismarck, North Dakota (“Owner”) and _____ (“Engineer”).

Engineer’s services under this Agreement are generally identified as professional services as described in the Request for Qualifications for Engineering Services issued by the Public Works Department on December 26, 2023, and may include services as follows: Provide instrumentation and control services, general engineering services, and design, bidding and construction services as requested for the Water Treatment Plant (WTP) and Waste Water Treatment Plant (WWTP), water distribution system, wastewater collection system and storm water collection system. Work can include repair or replacement of existing equipment and evaluation of treatment and conveyance processes.

From time to time Owner may request that Engineer provide professional services for Specific Projects. Each engagement will be documented by a Task Order. This Agreement sets forth the general terms and conditions which shall apply to all Task Orders duly executed under this Agreement.

Owner and Engineer further agree as follows:

1.01 Basic Agreement and Period of Service

- A. Engineer’s services will be detailed in a duly executed Task Order for each Specific Project. The general format of a Task Order is shown in Attachment 1 to this Agreement. Each Task Order will indicate the specific services to be performed and deliverables to be provided. If authorized by Owner, or if required because of changes in a Specific Project, Engineer shall furnish services in addition to those set forth in a Task Order. Owner shall pay Engineer for its services as set forth in Paragraph 7.01.
- B. This Agreement is not a commitment by Owner to Engineer to issue any Task Orders.
- C. Engineer shall not be obligated to perform any prospective Task Order unless and until Owner and Engineer agree as to the particulars of the Specific Project, including the scope of Engineer's services, time for performance, Engineer's compensation, and all other appropriate matters.
- D. This Agreement shall be effective and applicable to Task Orders issued hereunder from the Effective Date of the Agreement until December 31, 2027.
- E. The parties may extend or renew this Agreement, with or without changes, by written instrument establishing a new term.

1.02 Task Order Procedure

- F. Owner's Director of Utility Operations and Engineer shall agree on the scope, time for performance, and basis of compensation for each Task Order not exceeding \$20,000 per task. Task Orders that exceed \$20,000 will be presented to Owner for approval. Total costs for the Task Orders must remain within the approved Utility Budget for engineering, operations and maintenance. With respect to the scope of Engineer's services, each specific Task Order shall state the scope of services in the Task Order document itself. Each duly executed Task Order shall be subject to the terms and conditions of this Agreement.
- G. Engineer will commence performance as set forth in the Task Order.
- H. Engineer shall provide, or cause to be provided, the services set forth in the Task Order.

2.01 Payment Procedures

- A. *Invoices:* Engineer shall prepare invoices in accordance with its standard invoicing practices and submit the invoices to Owner on a monthly basis. Invoices are due and payable within 30 days of receipt. If Owner fails to make any payment due Engineer for services and expenses within 30 days after receipt of Engineer's invoice, then the amounts due Engineer will be increased at the rate of 1.75% per month (or the maximum rate of interest permitted by law, if less) from said thirtieth day. In addition, Engineer may, after giving seven days written notice to Owner, suspend services under this Agreement until Engineer has been paid in full all amounts due for services, expenses, and other related charges. Owner waives any and all claims against Engineer for any such suspension. Payments will be credited first to interest and then to principal. All payments under this Agreement shall be in United States Dollars.
- B. *Obligation to Pay:* Owner's obligation to pay for Engineer's services under this Agreement is not contingent on Owner's ability to obtain financing, third-party payments, governmental or regulatory agency approval, permits, final adjudication of lawsuit in which Engineer is not involved, Owner's successful completion of a project, or any other event. No retainage will be withheld.

3.01 Termination

- A. The obligation to continue performance under this Agreement may be terminated:
 - 1. For cause,
 - a. By either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms of the specific Task Order or this Agreement through no fault of the terminating party. Failure to pay Engineer for its services is a substantial failure to perform and a basis for termination.
 - b. By Engineer:
 - 1) upon seven days written notice if Owner demands that Engineer furnish or perform services contrary to Engineer's responsibilities as a licensed professional; or
 - 2) upon seven days written notice if the Engineer's services for the Specific Project are delayed for more than 90 days for reasons beyond Engineer's control.

Engineer shall have no liability to Owner on account of a termination by Engineer under Paragraph

3.01.A.1.b.

- c. Notwithstanding the foregoing, this Agreement will not terminate as a result of a substantial failure under Paragraph 3.01.A.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt of notice; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.

2. For convenience, by Owner effective upon Engineer's receipt of written notice from Owner.

- B. The terminating party under Paragraph 3.01.A may set the effective date of termination at a time up to 30 days later than otherwise provided to allow Engineer to complete tasks whose value would otherwise be lost, to prepare notes as to the status of completed and uncompleted tasks, and to assemble Specific Project materials in orderly files.
- C. In the event of any termination under Paragraph 3.01, Engineer will be entitled to invoice Owner and to receive full payment for all services performed or furnished in accordance with this Agreement and all reimbursable expenses incurred through the effective date of termination insofar as the work performed is usable in furtherance of the project.

4.01 Successors, Assigns, and Beneficiaries

- A. Owner and Engineer are hereby bound and the successors, executors, administrators, and legal representatives of Owner and Engineer (and to the extent permitted by Paragraph 4.01.B the assigns of Owner and Engineer) are hereby bound to the other party to this Agreement and to the successors, executors, administrators, and legal representatives (and said assigns) of such other party, in respect of all covenants, agreements, and obligations of this Agreement.
- B. Neither Owner nor Engineer may assign, sublet, or transfer any rights under or interest (including, but without limitation, moneys that are due or may become due) in this Agreement or any Task Order without the written consent of the other, except to the extent that any assignment, subletting, or transfer is mandated or restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement.
- C. Unless expressly provided otherwise, nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Owner or Engineer to any contractor, subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Engineer and not for the benefit of any other party.

5.01 General Considerations

- A. The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services. Subject to the foregoing standard of care, Engineer and its consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and

the publishers of technical standards.

- B. Engineer shall not at any time supervise, direct, control, or have authority over any contractor's work, nor shall Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor, or the safety precautions and programs incident thereto, for security or safety at the Project site, nor for any failure of a contractor to comply with laws and regulations applicable to such contractor's furnishing and performing of its work.
- C. Engineer neither guarantees the performance of any contractor nor assumes responsibility for any contractor's failure to furnish and perform its work in accordance with the contract between Owner and such contractor. Engineer is not responsible for variations between actual construction bids or costs and Engineer's opinions or estimates regarding construction costs.
- D. Engineer shall not be responsible for the acts or omissions of any contractor, subcontractor, or supplier, or of any of their agents or employees or of any other persons (except Engineer's own employees) at a Specific Project site or otherwise furnishing or performing any construction work; or for any decision made regarding the construction contract requirements, or any application, interpretation, or clarification of the construction contract other than those made by Engineer.
- E. The general conditions for any construction contract documents prepared hereunder are to be the "Standard General Conditions of the Construction Contract" as prepared by the Engineers Joint Contract Documents Committee (EJCDC C-700, 2013 Edition) except as provided in this Agreement and unless the parties agree otherwise in writing.
- F. All documents, including all reports, drawings, specifications, computer software or other items prepared or furnished by ENGINEER pursuant to this Agreement, are instruments of service with respect to the project. OWNER and ENGINEER shall co-own all such documents with no duty to account to the other. None of the documents are intended or represented to be suitable for reuse by OWNER or others on extensions of the project or on any other project. Any reuse without written verification or adaptation by ENGINEER for the specific purpose intended will be at OWNER's sole risk and without liability or legal exposure to ENGINEER. Any such verification or adaptation will entitle ENGINEER to further compensation at rates to be agreed upon by OWNER and ENGINEER.
- G. **ALLOCATION OF RISK. OWNER AND ENGINEER HAVE EVALUATED THE RISKS AND REWARDS ASSOCIATED WITH THIS PROJECT, INCLUDING ENGINEER'S FEE RELATIVE TO THE RISKS ASSUMED, AND AGREE TO ALLOCATE CERTAIN OF THE RISKS, SO, TO THE FULLEST EXTENT PERMITTED BY LAW, THE TOTAL AGGREGATE LIABILITY OF ENGINEER (AND ITS RELATED CORPORATIONS, SUBCONSULTANTS AND EMPLOYEES) TO OWNER AND THIRD PARTIES GRANTED RELIANCE IS LIMITED TO THE TOTAL INSURANCE PROCEEDS PAID ON BEHALF OF OR TO ENGINEER BY ENGINEER'S INSURERS IN SETTLEMENT OR SATISFACTION OF OWNER'S CLAIMS UNDER THE TERMS AND CONDITIONS OF ENGINEER'S INSURANCE POLICIES APPLICABLE THERETO (EXCLUDING FEES, COSTS AND EXPENSES OF INVESTIGATION, CLAIMS ADJUSTMENT, DEFENSE, AND APPEAL), UP TO THE AMOUNT OF INSURANCE LIMITS SPECIFIED UNDER THIS AGREEMENT, FOR ANY AND ALL INJURIES, DAMAGES, CLAIMS, LOSSES, OR EXPENSES (INCLUDING ATTORNEY AND EXPERT FEES) ARISING OUT OF ENGINEER'S SERVICES OR THIS AGREEMENT REGARDLESS OF CAUSE(S) OR THE THEORY OF LIABILITY, INCLUDING NEGLIGENCE, INDEMNITY, OR OTHER RECOVERY.**
- H. The parties acknowledge that Engineer's scope of services does not include any services related to a Hazardous Environmental Condition (the presence of asbestos, PCBs, petroleum, hazardous substances or waste as defined by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq., or

radioactive materials). If Engineer or any other party encounters a Hazardous Environmental Condition, Engineer may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Specific Project affected thereby until Owner:

(1) retains appropriate specialist consultants or contractors to identify and, as appropriate, abate, remediate, or remove the Hazardous Environmental Condition; and (2) warrants that the Site is in full compliance with applicable Laws and Regulations.

- I. Owner and Engineer agree to negotiate each dispute between them in good faith during the 30 days after notice of dispute, after which, if such negotiations are unsuccessful, the parties may exercise their rights at law.
- J. This Agreement is to be governed by the law of the State of North Dakota.
- K. If any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall be valid and binding upon the parties. One or more waivers by either party of any provision, term or condition shall not be construed by the other party as a waiver of any subsequent breach of the same provision, term or condition.

6.01 Total Agreement

- A. This Agreement (including any expressly incorporated attachments), constitutes the entire agreement between Owner and Engineer and supersedes all prior written or oral understandings. This Agreement may only be amended, supplemented, modified, or canceled by a duly executed written instrument.
- B. The parties agree that no change or modification to this Agreement, or any attachments hereto, shall have any force or effect unless the change is reduced to writing, dated, and made part of this Agreement. The execution of the change shall be authorized and signed in the same manner as this Agreement. Adjustments in the period of services and in compensation shall be in accordance with applicable paragraphs and sections of this Agreement. Any proposed fees by ENGINEER are estimates to perform the services required to complete the project as ENGINEER understands it to be defined. For those projects involving conceptual or process development services, activities often are not fully definable in the initial planning. In any event, as the project progresses, the facts developed may dictate a change in the services to be performed, which may alter the scope. ENGINEER will inform OWNER of such situations so that changes in scope and adjustments to the time of performance and compensation can be made as required. If such change, additional services, or suspension of services results in an increase or decrease in the cost of or time required for performance of the services, an equitable adjustment shall be made, and the Agreement modified accordingly.

7.01 Insurance Requirements.

- A. The Company shall provide insurance during all times covered by this agreement, at the following levels:

Workers' Compensation, etc.:

(1) State: Statutory Level

Comprehensive General Liability:

(1) Bodily Injury:	
\$2,000,000	Each Occurrence
\$2,000,000	Aggregate
(2) Property Damage:	
\$2,000,000	Each Occurrence
\$2,000,000	Aggregate

- | | | |
|-----|---|------------------------------|
| (3) | Pollution Liability
\$1,000,000
\$1,000,000 | Each Occurrence
Aggregate |
|-----|---|------------------------------|

Comprehensive Automobile Liability:

- | | | |
|-----|--|------------------------------|
| (1) | Bodily Injury:
\$1,000,000
\$1,000,000 | Each Person
Each Accident |
| (2) | Property Damage:
\$1,000,000 | Each Occurrence |

- B. The Owner shall be named as an additional insured on the policies for the work under this Agreement. The Owner shall be immediately notified of any cancellation or cessation of insurance coverage. Engineer shall provide a certificate of insurance prior to starting the work.

8.01 *Basis of Compensation*

- A. The basis of compensation for Services shall be identified in each specific Task Order. Owner shall pay Engineer for services in accordance with the applicable basis of compensation.

- A. The following basis of compensation are used for services under the Task Orders, as identified in each specific Task Order:

1. Lump Sum (plus any expenses expressly eligible for reimbursement)

- a. Using the procedures set forth in Paragraph 2.01, Owner shall pay Engineer as follows:

The Lump Sum will include compensation for Engineer's services and services of Consultants, if any. The Lump Sum constitutes full and complete compensation for Engineer's services in the specified category, including labor costs, overhead, profit, expenses (other than those expenses expressly eligible for reimbursement, if any), and Consultant charges.

2. Standard Hourly Rates (plus any expenses expressly eligible for reimbursement)

- a. Using the procedures set forth in Paragraph 2.01, Owner shall pay Engineer as follows:

- 1) An amount equal to the cumulative hours charged to the Specific Project by each class of Engineer's employees times standard hourly rates for each applicable billing class for all services performed on the Specific Project, plus reimbursable expenses and Engineer's consultants' charges, if any.
- 2) Engineer's Reimbursable Expense Rates & Standard Hourly Rates Schedules are attached as Appendix 1
- 3) Engineer's Reimbursable Expense Rates & Standard Hourly Rates Schedules are subject to revision on January 1 of each year.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the Effective Date of which is indicated on page 1.

OWNER:

ENGINEER:

By: Michael T. Schmitz

By: _____

Title: President of Board of City Commissioners

Title: _____

Date Signed: _____

Date Signed: _____

Address for giving notices:

Address for giving notices:

City of Bismarck

221 North 5th St

Bismarck, ND 58501

Attn: Michelle Klose, Director of Utility Operations

DRAFT

This is Task Order
No. _____, consisting of
_____ pages.

Task Order

In accordance with Paragraph 1.02 of the Short Form of Task Order Agreement Between Owner and Engineer for Professional Services, dated [] ("Agreement"), Owner and Engineer agree as follows:

1. Background Data

- a. Effective Date of Task Order:
- b. Owner:
- c. Engineer:
- d. Specific Project (title):
- e. Specific Project (description):

2. Services of Engineer

The specific services to be provided or furnished by Engineer under this Task Order are as follows:

[Insert scope of services here, or incorporate by reference a scope of services set out in a separate document such as a letter or proposal.]

3. Additional Services

Additional Services that may be authorized or necessary under this Task Order are as follows:

[Insert list of Additional Services here, or incorporate by reference a list of Additional Services set out in a separate document. Indicate whether advance authorization is needed, and include other governing terms and conditions.]

4. Owner's Responsibilities

Owner shall have those responsibilities set forth in the Agreement, subject to the following: *[State any additions or modifications for this Specific Project here.]*

5. Task Order Schedule

The parties shall meet the following schedule: *[Insert schedule obligations of Owner and Engineer as applicable.]*

6. Payments to Engineer

A. Owner shall pay Engineer for services rendered under this Task Order as follows: *[Insert description of compensation basis.]*

Compensation items and totals based in whole or in part on Hourly Rates are estimates only. Lump sum amounts and estimated totals included in the breakdown by phases incorporate Engineer's labor, overhead, profit,

reimbursable expenses (if any), and Consultants' charges, if any. For lump sum items, Engineer may alter the distribution of compensation between individual phases (line items) to be consistent with services actually rendered, but shall not exceed the total lump sum compensation amount unless approved in writing by the Owner.

B. The terms of payment are set forth in the Agreement.

7. Consultants retained as of the Effective Date of the Task Order:

8. Other Modifications to Agreement:

9. Attachments:

10. Other Documents Incorporated by Reference:

11. Terms and Conditions

Execution of this Task Order by Owner and Engineer shall make it subject to the terms and conditions of the Agreement (as modified above), which Agreement is incorporated by this reference. Engineer is authorized to begin performance upon its receipt of a copy of this Task Order signed by Owner.

The Effective Date of this Task Order is [].

OWNER:

ENGINEER:

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

DESIGNATED REPRESENTATIVE FOR TASK ORDER:

DESIGNATED REPRESENTATIVE FOR TASK ORDER:

Name: _____

Name: _____

Title: _____

Title: _____

Address: _____

Address: _____

E-Mail Address: _____

E-Mail Address: _____

Phone: _____

Phone: _____